QUESTIONS PRESENTED FOR REVIEW

1. Was Fulminante's confession coerced when a government agent threatened that Fulminante would be protected from impending inmate violence only if he renounced his denials and confessed?

2. Whether the admission of a coerced confession can be harmless error?

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STANDARD OF REVIEW

1. Voluntariness of a confession is a legal question requiring an independent determination by this Court. This issue is subject to plenary review. *Mincey* v. *Arizona*, 437 U.S. 385, 389 (1978).

2. In determining admissibility of a confession, the burden is on the state to prove, at least by a preponderance of the evidence, that the confession was voluntarily made. *Lego* v. *Twomey*, 404 U.S. 477, 489 (1972).

STATEMENT OF THE CASE

I. FBI Agent Ticano Directed Informant Sarivola To Obtain Incriminating Statements From Fulminante Even Though He Knew Sarivola Made His Living Using Violence.

A. The FBI Employed Sarivola Under A Contingent Fee Agreement.

In September, 1982, Agent Walter Ticano of the Federal Bureau of Investigation (FBI) was responsible for the arrest of Anthony Sarivola for extortion. The arrest resulted from Sarivola's "shylarking" in New York City for the Columbo crime family.[1] The Columbo family loaned money at exorbitant interest rates and Sarivola used violence to obtain repayment. J.A. 75, 78-79, 104-105, 134, 155-158.

Sarivola had done "shylarking" even while he was a salaried police officer. He gave up "full employment" as a policeman to devote more time to "shylarking." When arrested, Sarivola was still a certified police officer and

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[1] In the record is the unusual reference to "shylarking." In the context of extortion, in which the term was used, counsel suggests that those using the term really meant to refer to "Shylocking," drawn from the name of Shylock, the extortionate lender in Shakespeare's *The Merchant of Venice*.

had been working several days a month as a reserve police officer for the City of New York. J.A. 72-75, 103-105, 154-157; R.T. Dec. 11, 1985 at 44.

Sarivola had engaged in violent criminal activity in his position with the Columbo crime family and Agent Ticano knew of specific crimes Sarivola had committed. J.A. 154, 156-157. After his arrest, Sarivola signed an agreement to become a paid informant for the FBI. J.A. 76, 105-106, 129-131, 134-135. Ticano had a contingent fee agreement with Sarivola. If he obtained incriminating statements from suspects, Sarivola knew that "customarily" he would be paid. The amount of the payments depended on the "quality of the information provided." J.A. 79, 105-106. The FBI promised not to seek prosecution for any crimes against Sarivola, no matter how serious or violent. On the extortion charge that had already been prosecuted, Sarivola received a mere sixty day prison sentence. J.A. 77, 129-131, 134-135, 142-143, 152-158, 194.

Sarivola began his sentence in Raybrook Federal Prison in September, 1983. J.A. 77, 194. At the direction of the FBI, he obtained information from inmates. J.A. 66, 76, 81-82, 105-106, 108, 129-131, 134-135, 137-139, 151, 153, 157-158. Sarivola was not paid by the FBI while in prison, because he was paid "c.o.d." This meant Ticano would pay for information only after it was verified. J.A. 79, 105-106, 127-128, 138-139, 141; R.T. Dec. 11, 1985 at 48.

Between March, 1983, and September, 1984, the FBI paid Sarivola $22,490.00. He was paid for "running around town, whatever he had to do; gasoline, car rentals, phone calls, meals, nights out on the town with his buddies." J.A. 127-128, 131, 142-143.

B. Fulminante Was In Grave Danger In Prison.

Rumors spread throughout Raybrook that Fulminante had killed a child. J.A. 10, 80-81. The population at Raybrook included inmates convicted of violent crimes such as murder and robbery. J.A. 109. Prisoners known to have killed a child are "ostracized" and "in danger." J.A. 110.

As a result of the rumors, Fulminante was getting "tough treatment" from the other inmates and knew his life was in jeopardy. J.A. 10, 28-29, 40-41, 83, 109-110. Sarivola spoke about Fulminante's situation in prison during October, 1983:

> Sarivola: No, his [Fulminante's] time was running short.
>
> [Defense Counsel]: Well you got out before him, didn't you?
>
> Sarivola: That doesn't mean his time wasn't running short—his time to keep walking around was running short.
>
> [Defense Counsel]: I'm talking about getting out. . .
>
> Sarivola: No, he would have got out—but it wouldn't have been the way I got out—he would have went out of the prison horizontally.
>
> [Defense Counsel]: Why is that?
>
> Sarivola: Because most organized crime figures and most criminals who have some sort of scruples, regardless of what most people believe; and children is a very soft point except for animals and ah the more the story began to be talked about and get around the joint a lot of people were thinking of hurting the little gentleman.

[Defense Counsel]: Okay.

Sarivola: And he sort of needed somebody to back him up and help him . . . people were starting to avoid him and treat him like shit. J.A. 28-29.

Fulminante was 5 feet 3 inches tall and weighed 118 pounds. At forty-two years of age, he was much older than most of the other inmates. He was of low average to average intelligence and had no formal education past the fourth grade. R. 88i, 88o, 88t, 88x.

Fulminante had served an earlier prison term when he was twenty-six years old. R. 88t, 88b1. At that time, he feared other inmates "were going to kill him." R. 88x. At his own request, he was placed in protective custody. R. 88t-88b1. Once there, he could not cope with the isolation and in the end, he was admitted to a psychiatric hospital because of his emotional condition and his extreme fear of other inmates. R. 88t-88b1.

C. Fulminante Denied All Guilt Until Sarivola Offered Him Protection.

Shortly after entering prison, Sarivola told Ticano of rumors that Oreste Fulminante had killed his stepdaughter. J.A. 10, 80-82, 136. At this time, Ticano knew of Sarivola's "shylarking" activity and was aware that he made his living through violence. J.A. 133-134, 155-158. Ticano directed Sarivola to obtain incriminating statements from Fulminante. J.A. 10, 24, 27, 82, 108-109, 146.

Following Ticano's request, Sarivola repeatedly questioned Fulminante about the murder. Sarivola "continuously stayed around" Fulminante, spending several hours every day with him. Sarivola feigned friendship in order to obtain a confession. J.A. 80-82. Fulminante consistently denied any involvement in the murder. J.A. 81-82.

With only "a couple" weeks left before Sarivola's release, he employed a new approach. Sarivola reminded Fulminante that his life was in danger, and asked him about the murder. Sarivola then stated, "I will protect you in this prison from physical recriminations from other inmates," but, "for me to give you any help," "you have to tell me about it [the murder] . . . .[2] J.A. 24, 40-41, 82-83, 146. After being offered protection, Fulminante immediately confessed. J.A. 10, 28-29, 40-41, 83, 146.

Sarivola had the power to protect Fulminante from other inmates. In Raybrook, Sarivola held himself out as

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[2] The statement was phrased in several variations by Sarivola. The stipulated facts for the pretrial hearing state that Sarivola asked Fulminante "if these rumors were in fact true adding that he, Mr. Sarivola, might be in a position to help protect the defendant from physical recriminations in prison, but that the defendant must tell him the truth . . . ." J.A. 10. At trial, Sarivola testified that Fulminante was "starting to get tough treatment" from the inmates at which time Sarivola told Fulminante, "You have to tell me about it, you know. I mean, in other words, for me to give you any help." J.A. 83. In a pretrial interview, Sarivola stated that Fulminante's life was in danger in prison and that Sarivola told him, "if you want my help you're gonna have to be straight . . . ." J.A. 28-29.

Prior to the pretrial argument on the voluntariness of the confession, the prosecutor had interviewed Sarivola for several hours and on at least three occasions. J.A. 88-93. At the pretrial argument the following dialogue then occurred:

> [Prosecutor]: What I remember is that Mr. Sarivola said, "I will protect you in this prison from physical recriminations from other inmates," . . .
>
> The Court: Was it in the context of, "I will protect you if you will tell me about this incident?"
>
> [Prosecutor]: "If you will tell me the truth, did you or did you not kill this girl?" "Whether you did or didn't," was not the crux. The crux was, "Just tell me the truth and I will protect you then, because some of these inmates here may try to hurt you physically" . . . . J.A. 41.

an influential member of an organized crime family. J.A. 45-48, 66-67, 78. Further, Sarivola served on a prison commission that had "some control over what went on there in the prison." The prosecutor admitted Sarivola "was in a position to probably help provide physical protection." J.A. 41-42.

D. The FBI Exerted Pressure Upon Sarivola To Obtain Incriminating Statements From Suspects.

1. Sarivola Was Pressured Into Producing A "Phony Tape."

In January, 1984, after Sarivola was released from prison, Agent Ticano told Sarivola to obtain information on a suspect named "Mike." Shortly thereafter, Sarivola gave Ticano an audio tape of a conversation allegedly between Sarivola and "Mike." "Juice" (interest on extortionate loans) was discussed on the tape. J.A. 97-98, 100-102, 139-140.

The tape proved to be a "phony." Background noise on the tape was inconsistent with the location where the alleged conversation occurred. This made the FBI suspicious. In response to Ticano's questions, Sarivola insisted that the taped conversation was authentic. Ticano demanded a polygraph test, which Sarivola failed. Sarivola then admitted that he had been lying and that the tape was a fraud. J.A. 140-141.

The FBI investigation of "Mike" had been moving slowly. Agent Ticano admitted, "I was receiving pressure from my boss, and so I kind of leaned on Tony [Sarivola] to accomplish, you know, the task that we had set out to do, and I guess he felt pressured . . . ." J.A. 139. Sarivola testified that Ticano was "putting a lot of pressure on me" and as a result, Sarivola fabricated the conversation and

continued to lie about it. The FBI continued to use Sarivola as a paid informant. J.A. 96-98, 141.

2. Sarivola Obtained A Confession Within Twenty-Four Hours Of Being Told By Ticano To "Get Me The Whole Story."

When he first heard of the rumors, Ticano told Sarivola, "I don't know anything about it, find out what it's about." J.A. 24. Ticano "didn't pressure" Sarivola at that time because he did not know anything about the crime. Sarivola stated, "If he's [Ticano is] going to lean on somebody, if he's gonna do something, he wants to know what he's doing." J.A. 25-26.

On October 20, 1983, Ticano went to Raybrook to talk to Sarivola "on an unrelated matter." Sarivola gave Ticano "a little bit more" information regarding the murder. Ticano then told him, "I gotta know the whole story. Get me the whole story." J.A. 24, 146. According to Ticano, within twenty-four hours he received a telephone call from Sarivola informing him that Fulminante had made a full confession to the murder. J.A. 24, 144-148. According to Sarivola, it was several days after the personal visit from Ticano that he obtained the confession. J.A. 27-28.

II. The State Of Arizona Concedes That There Was Not A "Triable" Case Against Fulminante In The Absence Of A Confession.

Although the victim died on September 13, 1982, the state did not charge Fulminante until September 4, 1984. J.A. 2. This did not occur until five months after his release from prison and his alleged confession to Sarivola's wife. J.A. 2, 91-92, 110.

In his opening statement, the prosecutor stated:

> [B]ut what brings us to court, what makes this case fileable, and prosecutable and triable is that later, Mr. Fulminante confesses this crime to Anthony Sarivola and later, to Donna Sarivola, his wife.

J.A. 65-66. In the Answering Brief filed with the Arizona Supreme Court, the State of Arizona conceded that prior to the confessions, although the police suspected Fulminante, they did not have enough evidence to charge him. J.A. 193-194.

III. The Arizona Supreme Court Specifically Stated It Applied The "Totality Of The Circumstances" Test When It Found That The Confession Was "Coerced In Every Sense Of The Word."

In the original opinion, the Arizona Supreme Court stated:

> Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover, the defendant maintains that Sarivola's promise was "extremely coercive" because the "obvious" inference from the promise was that his life would be in jeopardy if he did not confess. We agree.

Pet. App. A19. In its supplemental opinion, the Arizona Supreme Court again examined the "totality of the circumstances," and held that "This is a true coerced confession in every sense of the word." Pet. App. C9.

The Arizona Supreme Court held the trial court's voluntariness ruling to be "clear and manifest" error. The Arizona Supreme Court stated that the error was caused by defense counsel's failure to present any evidence at the

voluntariness hearing. Pet. App. A20-A21. Defense counsel submitted the issue on the version of the facts set out by the prosecutor in his motion. J.A. 10, 30-31, 40, 42-43.

SUMMARY OF ARGUMENT

1. In October, 1983, Oreste Fulminante was an inmate when rumors spread throughout Raybrook Prison that Fulminante had murdered a child. As a result, Fulminante was in grave danger of physical harm from the other inmates.

At the same time, Anthony Sarivola was a government informant working in the prison. He had the power to protect Fulminante from the other inmates. Sarivola had a known affiliation with the Columbo organized crime family. He also had power because of his position on a prison commission.

Sarivola was directed by an FBI agent to get a confession from Fulminante. Sarivola approached Fulminante and reminded him that his life was in jeopardy. Sarivola then stated he would protect Fulminante from the other inmates, but only if he confessed to the murder. Fulminante was forced to renounce his repeated denials and confess to be protected. He immediately confessed.

This case is indistinguishable from *Payne* v. *Arkansas*, 356 U.S. 560 (1958), in which this Court held that the confession was coerced. In *Payne* the defendant was arrested for murder and, despite repeated questioning, refused to confess. The police chief then told the defendant that there was a mob outside the police station that wanted "to get him." However, if he "told the truth" about the murder, the police chief "would probably keep them from coming in."

2. In *Brown* v. *Mississippi*, 297 U.S. 278 (1936), this Court held coerced confessions inadmissible under the Due Process Clause of the Fourteenth Amendment. Under this tenet, if a coerced confession is admitted at trial, the conviction must be vacated no matter how overwhelming the other evidence. In twenty-four opinions this Court has held, under the Due Process Clause, that the harmless error doctrine cannot apply to the admission of a coerced confession.

In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court held that harmless error analysis could apply to constitutional error, but specifically noted that the doctrine could not apply to coerced confessions. Since *Chapman*, this Court has reaffirmed this principle on at least five occasions. In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), a coerced confession was admitted at trial. This Court again held that the harmless error doctrine could not apply and the case was reversed.

In *Rose* v. *Clark*, 478 U.S. 570 (1986), this Court stated, "This limitation recognizes that some errors necessarily render a trial fundamentally unfair." As Justice Stevens stated in a concurring opinion, this is because "our Constitution and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination." 478 U.S. 570, 588.

In *Rogers* v. *Richmond*, 365 U.S. 534 (1961), this Court held that harmless error analysis was inapplicable to a coerced confession, and stated:

> This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.

365 U.S. 534, 540-541. This analysis was explicitly approved in *Miller* v. *Fenton*, 474 U.S. 104, 109-110, and this Court further stated that certain interrogation techniques "are so offensive to a civilized system of justice that they must be condemned." 474 U.S. 104, 109.

3. In September, 1982, FBI Agent Ticano was responsible for the arrest of Sarivola for extortion. The arrest was the result of Sarivola's "shylarking" in New York City for the Columbo organized crime family. Money was loaned at exorbitant interest rates and Sarivola used violence to collect on the loans. At the same time, Sarivola was working as a certified police officer.

Agent Ticano knew Sarivola had an extensive history of violent crime and knew of specific crimes he had committed. However, Ticano did not seek a lengthy prison term. Instead, Ticano gave Sarivola a written contract that assured that he would not do more than sixty days in prison.

Sarivola was employed on a contingent fee basis. He would be paid well, but only if he obtained incriminating statements from targeted suspects. Payment was made according to the "quality of the information provided."

Ticano knew that Sarivola had a long history of obtaining results by using violence. Ticano knew that if he directed Sarivola to obtain a confession, there was a strong likelihood that Sarivola would use violence to do so.

In January, 1984, Ticano targeted a suspect and pressured Sarivola to get information. Ticano admits that on this occasion he unduly pressured Sarivola. Sarivola also

acknowledges that Ticano applied extreme pressure on him to get incriminating information. Responding to this pressure, Sarivola produced an audio tape recording with incriminating evidence against the target. This was done in order to get Ticano "off his back." Sarivola admitted the tape was a fraud only after failing a polygraph examination.

Ticano knew that Sarivola would obtain information for him by either lying or using violence. Ticano continued to use Sarivola against targeted suspects.

Sarivola was unable to obtain a confession through the use of the deception of friendship. With only "a couple weeks" left on Sarivola's prison term, Ticano visited him in prison and directed him to "get the whole story." Within twenty-four hours of this directive, Sarivola obtained a confession.

In *Spano* v. *New York*, 360 U.S. 315 (1959), in addition to a coerced confession, there was also a second voluntary confession and an eyewitness testified. Despite the overwhelming evidence of guilt, this Court held the conviction had to be reversed. This Court stated:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that *in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.* (Emphasis added).

360 U.S. 315, 320-321. The conduct of Agent Ticano shows the continued validity of the above principle.

To understand the unconscionability of Agent Ticano's actions, one should consider the fact that if condoned,

Ticano could target any citizen. Ticano's conduct is by no means limited to a prison setting. Indeed, evidence was presented at trial, that while out of prison Sarivola was directed to obtain information from a targeted suspect.

No one can truly feel free knowing that at Ticano's whim, Sarivola could be sent to obtain a confession from that person. Not many people are a fair match for a professional schooled in the art of using violence to obtain what he wants. If Ticano offered Sarivola a sufficient contingent fee, there is little doubt that Sarivola would obtain a confession from any targeted person.

The State of Arizona has conceded that Sarivola was a government agent in Raybrook. His interrogation technique is so offensive to a civilized system of justice that it should be condemned. The conduct of FBI Agent Ticano in this case is even more egregious.

ARGUMENTS

I. FULMINANTE'S CONFESSION WAS IMPROPERLY ADMITTED AT TRIAL AS IT WAS THE PRODUCT OF EXTREME COERCION.

A. A Government Agent Gave Fulminante The Choice Of Physical Harm At The Hands Of Hostile Inmates Or Receipt Of Protection In Exchange For A Confession.

1. Informant Sarivola Knew The Use Of Coercion Was Necessary To Obtain A Confession.

Immediately prior to the confession, Sarivola told Fulminante that he was in grave danger. J.A. 10, 28-29, 40-41. The State of Arizona concedes that Fulminante "thought Sarivola still had connections with organized crime and would have been able to protect him." Brief of Petitioner 9-10. Sarivola also had the power to protect Fulminante because of his position on a prison commission. J.A. 41-42. However, the state contends that Fulmi-

nante's will was not overborne by the offer of protection.[3] Brief of Petitioner 9-10, 18-19.

It is the state's contention that it was merely a coincidence that Fulminante confessed immediately after the offer of protection. This ignores the fact that under the guise of friendship, Sarivola had repeatedly questioned Fulminante about the murder. Fulminante had consistently denied any involvement. J.A. 80-82.

Sarivola's actions show that he believed the offer of protection was necessary to overbear Fulminante's will. He was in the best position to make that judgment, as he was present and entirely aware of the surrounding circumstances. Obviously, he determined that such an offer was necessary. Otherwise, there was no reason to offer protection in exchange for a statement from Fulminante.

Sarivola's judgment that physical coercion was necessary should be viewed in light of the fact that Sarivola had successfully gone through the police academy. He was certified as a police officer by the State of New York. J.A. 72-75, 103-105, 154-157; R.T. Dec. 11, 1985 at 44. Police officers are trained in the art of interrogation and know what psychological ploys are successful. These range from deception to the "Mutt and Jeff" act. See *Miranda* v. *Arizona*, 384 U.S. 436, 447-455 (1966).

Sarivola's professional assessment of the need for coercion was proven correct. Although Fulminante had con-

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[3] The state also implies that the confession is voluntary because Fulminante never claimed that he confessed to obtain protection. Brief of Petitioner i, 19. A defendant is not required to make a statement to prove coercion. In *Lee* v. *Mississippi*, 332 U.S. 742 (1948), this Court held that a confession was coerced even though the defendant denied confessing.

tinually denied involvement, he confessed when offered protection. The State of Arizona offers no other explanation for this abrupt change in Fulminante's position. Clearly, Fulminante's will was overborne by Sarivola's calculated use of coercion.

2. Sarivola Required Fulminante To Give A "Full Confession" In Exchange For Protection From Physical Harm.

a. The state concedes that Sarivola told Fulminante that he had to "tell the truth" in order for Sarivola "to give him any help" with the threat of physical harm from other inmates. Brief of Petitioner 5. The State of Arizona contends that Sarivola did not require a confession and that Fulminante "had to know that Sarivola would still help him, regardless of what he said, *if Sarivola believed him*." Brief of Petitioner 22 (emphasis added). The facts belie this contention.

First, requiring Fulminante to make any statement violates his right to remain silent under the Fifth Amendment. An individual is denied his Fifth Amendment privilege against self-incrimination, if government conduct denies him a "*free choice* to admit, to deny, or *to refuse to answer.*" *Minnesota* v. *Murphy*, 465 U.S. 420, 429 (1984) (emphasis added). This is equally true under the Due Process Clause. Any statement by Fulminante, whether true or not, was therefore coerced and thus, inadmissible at trial.

Sarivola was not going to accept anything less than a confession from Fulminante. He worked on a contingent fee basis with FBI Agent Ticano. Sarivola was paid according to the "quality" of the information he obtained. J.A. 79, 105-106, 127-128, 138-139, 141; R.T. Dec. 11, 1985 at 48. It cannot seriously be argued that he was going to

receive payment for statements completely exonerating suspects.

Sarivola had questioned Fulminante about the murder on numerous occasions. Fulminante had continually denied any involvement. If Sarivola had "believed" the consistent denials, there was no reason for him to require another denial. Sarivola's actions made it clear to Fulminante that he would not accept any statement other than a confession.

In *Payne* v. *Arkansas*, 356 U.S. 560 (1958), a police chief informed the defendant that if he would "tell the truth" about a murder, the police chief would protect him from an angry mob. Prior to the statement the defendant had continually denied guilt. As he immediately confessed after the statement, this Court held that the confession was coerced. In *Payne*, this Court considered the police chief's request for "the truth" to be a demand for a full confession. Similarly, in this case, Sarivola's request for "the truth" was clearly a demand for a confession.

b. The Solicitor General contends that the confession was not coerced because Sarivola did not personally threaten to injure Fulminante, but rather, was only going to allow others to harm him. Brief for the United States 6, 15. This same contention was rejected in *Payne* v. *Arkansas*. This Court stated:

> [t]here is torture of mind as well as body; the will is as much affected by fear as by force . . . . A confession by which life becomes forfeit must be the expression of free choice. (Citation omitted.)

356 U.S. 560, 566-567.

It cannot seriously be claimed that one is less compelled to answer questions if a gun is held to one's head by a third person, rather than by the interrogator. This is especially

true if the interrogator has the power to stop the person holding the gun. See *Beecher* v. *Alabama (I)*, 389 U.S. 35 (1967). Fulminante was subject to physical harm at the hands of other inmates, and the interrogator, Sarivola, had the power to stop the other inmates. Sarivola made it clear to Fulminante that if he did not cooperate with him, Fulminante was going to receive rough treatment from the other inmates.

B. When A Confession Is Obtained After Threats Of Physical Brutality, It Should Be Held Coerced *Per Se*.

This Court has found some situations so inherently coercive that no examination of the personal characteristics of the defendant was necessary. See *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 154 (1944). Implicit in such rulings is the view that some police techniques, such as threats of physical brutality, would lead any person to confess.

This Court has applied this "per se" reversal rule where a suspect has been confronted with the threat of direct physical harm. *Beecher* v. *Alabama (I)*. This rule has also been applied in cases where the defendant has been threatened with the possibility of mob violence. *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Ward* v. *Texas*, 316 U.S. 547 (1942).

In *Stein* v. *New York*, 346 U.S. 156 (1953), this Court stated:

> When [physical violence or the threat of it] is present, there is no need to weigh or measure its effects on the will of the individual victim. The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by

> treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

346 U.S. 156, 182.

Fulminante's will was overborne by the threat of physical brutality at the hands of other inmates. This Court need not look at other "circumstances." This Court should hold, *per se*, that the confession was coerced.

C. Applying The "Totality Of The Circumstances" Test, The Confession Was Clearly Coerced.

The state argues that under the "totality of the circumstances" test, the confession was voluntary. The state alleges only two "circumstances" to support this claim. First, that Fulminante was not vulnerable to threats, and second, that there was no misconduct by government agents.

1. Fulminante Was Vulnerable To Threats Of Physical Harm.

The state concedes that Sarivola's offer of protection could be viewed as "objectively coercive" and "could well have been sufficient inducement to overbear the will of a young, weak, or fearful individual." Brief of Petitioner 19-20. However, the state contends that Fulminante's will was not overborne because he had been to prison twice before and therefore, "was already a hardened criminal who knew how to take care of himself while in prison." Brief of Petitioner 18.

This conclusion is contradicted by the facts. If Fulminante "knew how to take care of himself while in prison," he would not have been in danger from other inmates. Certainly, at 5 feet 3 inches tall, 118 pounds, and forty-two years of age, Fulminante did not have a physical advantage over other inmates. R. 88x, 88a1. Further, his low average to average intelligence gave him no advantage. R. 88i, 88o; Brief of Petitioner 18.

The conclusion that Fulminante "knew how to take care of himself," ignores the serious difficulties he experienced during earlier imprisonment. At twenty-six, he was so terrified of being in the general prison population, that he was placed in protective custody at his own request. However, he could not emotionally handle the isolation of protective custody and, with no other alternative, a psychiatrist had Fulminante committed to a psychiatric hospital. R. 88t-88b1.

Fulminante was in the general population at Raybrook. J.A. 77-78, 80, 107. The state failed to prove that Fulminante was more capable of coping with prison life in 1983. If anything, it would have been even more difficult to cope with prison life at forty-two years of age, than it had been at twenty-six.

It appears that Fulminante was able to cope in Raybrook only because he thought Sarivola had befriended him. Sarivola had the power to protect him from the other inmates, and he could survive with this influential friend. There is no doubt his will was overborne when Sarivola told him he would have no protection from the other inmates if he did not confess.

2. The Conduct Of FBI Agent Ticano Threatens The Very Core Of A Free Society.

a. Ticano Sent A Known Violent Criminal To Obtain Statements From Fulminante.

Sarivola was a "dirty cop." Agent Ticano employed him to do police investigation work. However, Sarivola no longer wore a uniform, as he now was involved in secret

police activities. Ticano targeted specific individuals and told his professional "strong arm man" he would be well paid, but only if he obtained incriminating statements from his targets.

Ticano knew that for years Sarivola got what he wanted through the use of force. Ticano had to know that if he requested a confession, there was a strong likelihood Sarivola would use the threat of force to obtain it. Sarivola had not collected payments for the Columbo family through the mere use of his charm.

Knowing that the deception of friendship had not worked, Ticano told Sarivola, "I gotta know the whole story. Get me the whole story." J.A. 24, 146. Ticano knew Sarivola had substantial incentives to obtain what Ticano requested and knew that Sarivola was literally a professional at obtaining what was requested by his employer.

It is difficult to envision more reprehensible conduct by the police than sending a violent criminal to approach a singled-out suspect. This conduct is even more egregious when the police give this professional "strong arm man" substantial financial and other incentives to "shake down" his prey for information. This is the conduct one might expect from secret police in a repressive society. It certainly is repugnant to the concept of liberty under the Due Process Clause of the Fourteenth Amendment.

Ticano could target any citizen. Ticano's conduct is by no means limited to a prison setting. Indeed, evidence was presented at trial, that while out of prison, Sarivola was directed to obtain information from a suspect named "Mike."

No citizen can feel free knowing that at Ticano's whim, Sarivola could be sent to obtain his confession. Few citizens are a fair match for a professional "strong arm man."

If Ticano offered a sufficient fee, Sarivola could obtain a confession from any targeted citizen.

b. Ticano Exerted Pressure Upon Sarivola To Obtain A Confession.

Sarivola stated that when Ticano "wanted" results, he would put extreme pressure upon Sarivola. Ticano knew of Sarivola's propensity for the use of violence to obtain what he wanted. In light of this fact, it was unconscionable for Ticano to exert pressure on Sarivola to obtain a confession. It was certainly foreseeable that Sarivola would use the threat of force to obtain a confession.

The fact that Sarivola did not threaten to personally hurt Fulminante does not mitigate Ticano's misconduct. Ticano knew Sarivola had failed in the use of deception. If Sarivola had been unsuccessful in his attempts to exploit the threats of others, Ticano should have known Sarivola would in all likelihood, either personally use force to obtain a confession or simply fabricate one.

D. The Facts Of This Case Are Indistinguishable From The Facts In *Payne* v. *Arkansas* In Which This Court Held The Confession Was Coerced.

In *Payne* v. *Arkansas*, the defendant was arrested for murder. He was interrogated for an "extended time" and continually denied any involvement in the murder. The police chief then told the defendant that he had "not told him all of the story—he [police chief] said that there was 30 or 40 people outside that wanted to get me, and he said if I would come in and *tell him the truth* that he would probably keep them from coming in." 356 U.S. 563, 564 (emphasis added).

Other inmates "wanted to get" Fulminante. Sarivola told Fulminante that if he would "tell him the truth," he

"would probably keep them from coming" after him. In *Payne*, this Court placed substantial importance on the fact that the defendant had continually denied involvement, but after the police chief's statement, immediately confessed. Fulminante also continually denied involvement in the murder, but after Sarivola's statement, immediately confessed.

In *Payne*, this Court also considered the fact that the defendant was "mentally dull" with only a fifth grade education; not advised of his right to remain silent or of his right to counsel as required by Arkansas statutes; and, held in custody without benefit of counsel, friends or family members.

Fulminante has low average to average intelligence and no formal education past the fourth grade. He was not given *Miranda* rights or otherwise informed that he had the right to remain silent and the right to counsel. He was held in prison without benefit of counsel or a "true" friend.

The only difference between Payne and Fulminante was their age and the fact that Payne had been given a limited amount of food before the confession. Payne was nineteen years old. These factors clearly do not distinguish this case from *Payne* v. *Arkansas*.

In *Payne*, this Court stated, "It seems obvious from the *totality* of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an 'expression of free choice.'" 356 U.S. 560, 567 (footnotes omitted). This Court stated that the use at trial of this coerced confession, "deprived him [Payne] of 'that fundamental fairness essential to the very concept of justice,' and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment." 356 U.S. 560, 567. (Footnote omitted). Fulminante also has been denied "fundamental fairness." His conviction cannot be allowed to stand.

E. The Conduct Of Sarivola Constitutes State Action.

Coercive police activity is a predicate to finding that a confession is involuntary. *Colorado* v. *Connelly*, 479 U.S. 157 (1986). The State of Arizona concedes that at all pertinent times Sarivola was a paid FBI informant.[4] Brief for Petitioner 4-5. Undercover police officers posing as fellow inmates are government agents. *Illinois* v. *Perkins*, 1990 U.S. LEXIS 2885 (decided June 4, 1990). See also *United States* v. *Henry*, 447 U.S. 264 (1980). Sarivola was no less a government agent by the mere distinction that he was a "dirty" policeman.

II. ADMISSION OF A COERCED CONFESSION IS NOT SUBJECT TO HARMLESS ERROR ANALYSIS.

A. This Court Has Held In Twenty-Five Opinions And Over A Span Of Ninety Years That A Coerced Confession Is Not Subject To Harmless Error Analysis.

This Court has been unequivocal for over 90 years in holding that a conviction cannot be allowed to stand if a "coerced" confession is admitted at trial. This principle has been stated by this Court in no fewer than twenty-five

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[4] At the pretrial hearing on the voluntariness of the confession, it was stipulated that "Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I." J.A. 10, 30-31, 40, 42-43. During trial, the prosecutor, Agent Ticano and Sarivola, admitted that while in Raybrook Prison, Sarivola was a paid government informant. J.A. 66, 76, 81-82 105-106, 108, 129-131, 134-135, 137-139, 151, 153, 157-158. Thus, the State of Arizona conceded before the Arizona Supreme Court and now concedes before this Court, that Sarivola was a government agent. J.A. 194; Brief of Petitioner 4.

opinions.[5] The opinions hold that no matter how sufficient the evidence aside from a coerced confession, the harmless error doctrine cannot apply. This Court has never made exceptions to this principle

In *Chapman* v. *California*, 386 U.S. 18 (1967), this Court held that some constitutional errors are subject to the harmless error doctrine. However, this Court specifically stated:

> [t]here are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error, [8]. . .
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> * * *
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> 8. See, e.g., *Payne* v. *State of Arkansas*, 356 U.S. 560, 78 S.Ct. 844, 2 L.Ed.2d 975 (*coerced confession*) . . . 87 S.Ct. at 827-828. (Emphasis added.)

In his concurring opinion in *Chapman*, Justice Stewart stated that the inapplicability of the harmless error rule to

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[5] *Bram* v. *United States*, 168 U.S. 532 (1897); *Brown* v. *Mississippi*, 297 U.S. 278 (1936); *Chambers* v. *Florida*, 309 U.S. 227 (1940); *Lisenba* v. *California*, 314 U.S. 219 (1941); *Ashcraft* v. *Tennessee*, 322 U.S. 143 (1944); *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944), rehearing denied, 323 U.S. 809; *Malinski* v. *New York*, 324 U.S. 401 (1945); *Haley* v. *Ohio*, 332 U.S. 596 (1948); *Watts* v. *Indiana*, 338 U.S. 49 (1949); *Gallegos* v. *Nebraska*, 342 U.S. 55 (1951); *Stroble* v. *California*, 343 U.S. 181 (1952), rehearing denied, 343 U.S. 952; *Brown* v. *Allen*, 344 U.S. 443 (1953), rehearing denied, two cases, 345 U.S. 946; *Payne* v. *Arkansas*, 356 U.S. 560 (1958); *Spano* v. *New York*, 360 U.S. 315 (1959); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960); *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Chapman* v. *California*, 386 U.S. 18 (1967); *Lego* v. *Twomey*, 404 U.S. 477 (1972); *Mincey* v. *Arizona*, 437 U.S. 385 (1978); *New Jersey* v. *Portash*, 440 U.S. 450 (1979); *Connecticut* v. *Johnson*, 460 U.S. 73 (1983); *Rose* v. *Clark*, 478 U.S. 570 (1986).

coerced confessions does not turn on their evidentiary impact. Rather, the constitutional right involved is so fundamental and absolute that it will not permit courts to indulge in nice calculations as to the harm arising from its denial.

This Court has considered this issue since *Chapman*. In *Mincey* v. *Arizona*, 437 U.S. 385 (1978), coerced statements were used for impeachment. This Court held that any "use against a defendant of his *involuntary* statement is a denial of due process of law." 437 U.S. 385, 398. This was true "even though there was ample evidence aside from the confession to support the conviction." 437 U.S. 385, 398.

In holding that harmless error analysis cannot apply to coerced statements, this Court specifically cited *Chapman* v. *California* as authority. 437 U.S. 385, 398. This Court also cited several other cases including *Haynes* v. *Washington*, 373 U.S. 503 (1963), and *Stroble* v. *California*, 343 U.S. 181 (1952), as noteworthy. In *Stroble* there were five admissible confessions, and in *Haynes*, two admissible confessions in addition to a coerced confession. This Court held in each case that the harmless error doctrine could not apply.

In *Rose* v. *Clark*, 478 U.S. 570 (1986), this Court stated:

> Despite the strong interests that support the harmless-error doctrine, the Court in *Chapman* recognized that some constitutional errors require reversal without regard to the evidence in the particular case. 386 U.S. at 23, n. 8, . . . citing *Payne* v. *Arkansas*, . . . (introduction of coerced confession) . . . *This limitation recognizes that some errors necessarily render a trial fundamentally unfair.* (Emphasis added and citations omitted.)

478 U.S. 570, 577. This Court found that admission of a coerced confession "aborted the basic trial process." 478 U.S. 570, 578 n. 6.

In a concurring opinion, Justice Stevens stated:

> [V]iolations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial . . . . The admission of a coerced confession can never be harmless even though the basic trial process was otherwise completely fair and the evidence of guilt overwhelming.[3]
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> 3. *See Payne* v. *Arkansas* . . . *("[T]his Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment")* . . . (Emphasis added.)

478 U.S. 570, 587-588. The opinion continues:

> In short, as the Court has recently emphasized, our Constitution, and our criminal justice system, protect other values besides the reliability of the guilt or innocence determination. (Footnote omitted).

478 U.S. 570, 588. *Rose* v. *Clark* again makes it clear that a conviction should be vacated if a coerced confession is admitted at trial, no matter how overwhelming the other evidence.

B. In Five Cases, This Court Held Admission Of A Coerced Confession Cannot Be Harmless Error, Even Though Other Confessions Were Properly Admitted.

In five cases, this Court has held that where a coerced confession is admitted at trial, it is irrelevant that there

are other properly admitted confessions. The conviction must be reversed. *Stroble* v. *California*, 343 U.S. 181 (1952) (five admissible confessions); *Malinski* v. *New York*, 324 U.S. 401 (1945) (three admissible confessions); *Haynes* v. *Washington*, 373 U.S. 503 (1963) (two admissible confessions); *Spano* v. *New York*, 360 U.S. 315 (1959) (one admissible confession); *Payne* v. *Arkansas*,[5] 356 U.S. 560 (1958) (one admissible confession).

C. The Harmless Error Doctrine Is Inapplicable To The Facts In This Case.

1. There Was Not "Overwhelming" Evidence In Addition To The Improperly Admitted Confession.

a. The State Had A Weak Case In The Absence Of The Confessions.

The victim died on September 13, 1982. The indictment was not filed until September 4, 1984, which was after the confessions to Sarivola and his wife. The logical conclusion

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[5] In *Payne* v. *Arkansas*, this Court held that a conviction had to be vacated because a "coerced" confession had been admitted at trial. After retrial, the case was considered on appeal by the Supreme Court of Arkansas. *Payne* v. *State*, 332 S.W.2d 233 (1960). The Arkansas court discusses the fact that aside from the first "coerced" confession, there was a reenactment of the crime which constituted a second confession. 332 S.W.2d 233, 235. The dissenting opinion notes that in this Court's opinion in *Payne* v. *Arkansas*, there is no mention whatsoever of the second confession. 332 S.W.2d 233, 236.

The state court in *Payne* considered the issue of whether or not the second confession was voluntary and thus admissible at trial. Obviously, as this Court did not discuss the second confession at all, this Court was not concerned whether the second confession was voluntary. In light of this fact, and the fact that this Court vacated the conviction, the only logical conclusion is that this Court determined that the conviction based on a coerced confession had to be vacated even if there was a second admissible confession.

is that the prosecution did not feel it could make its case in the absence of a confession. The State of Arizona concedes this fact. J.A. 2, 65-66, 195.

b. Donna Sarivola's Testimony Is Subject To Substantial Doubt.

This Court has never allowed harmless error analysis to be applied to the admission of a coerced confession. As to other constitutional error, before it "can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).

This case was not "triable" in the absence of the confessions. The confession to Anthony Sarivola was inadmissible as it was coerced. Thus. based solely on admissible evidence, the state's case now rests on Donna Sarivola's testimony.

Donna Sarivola's testimony by no means constitutes overwhelming evidence. Her entire testimony comprises only twenty-nine transcript pages and is highly suspect. R.T. Dec. 13, 1985 at 5-33.

The day Fulminante was released from prison, Anthony and Donna Sarivola went to considerable inconvenience to pick him up in New York City. This was done so he could go on a trip with them to Pennsylvania. J.A. 110-111, 114-115, 165-168, 176-177. Sarivola testified that he was thoroughly repulsed when Fulminante confessed to him, because only an animal would commit such a crime against a child. J.A. 28-29, 87. In light of this fact, it is incredible that Sarivola would inconvenience himself so Fulminante could meet Sarivola's wife and travel with them.

Donna testified that within a couple hours of meeting Fulminante, she "just casually asked him why he was

going" with them to meet Anthony's friends, instead of visiting his relatives. According to Donna, in response to this question, Fulminante made a full confession. J.A. 167-168. It is extremely doubtful that anyone, in response to a casual question from a new acquaintance, would confess to a murder.

According to Donna, she too was disgusted by the confession, however, she never notified anyone of it. Shortly after the confession, she mentioned to her husband that the confession disgusted her, but she did not discuss it with him or anyone else. Although claiming she was disgusted, Donna admits that she later went on a second trip with Fulminante. J.A. 114-115, 171-174, 179.

Over a year later, Anthony Sarivola was being interviewed by the prosecutor when Sarivola telephoned his wife. Sarivola asked her if she could "remember" the confession Fulminante had made to her. Sarivola said "gee, it had slipped his mind" that Fulminante had also confessed to Donna. J.A. 88-92, 114, 170.

It is impossible to believe that anyone would forget that their wife had heard someone confess to murdering a child. This is even more true because Sarivola was a member of the Columbo family, and as the presentence writer states, it is common knowledge that such persons greatly abhor any violence against children. Sarivola testified that he was repulsed by this crime. J.A. 28-29, 87, 104; R. 88.

There is a more logical explanation for Sarivola's sudden recollection that Fulminante had confessed over a year earlier to Donna. He probably suspected that the prosecutor had reservations about the truthfulness of the first confession. Indeed, even after the first confession, the prosecutor had not filed charges and allowed Fulminante

to be released from prison. Sarivola then came up with corroboration by having his wife also testify to having heard a confession.

Sarivola was in the Federal Witness Protection Program when he first announced the second confession. J.A. 88-92, 114, 127, 170. He was under great pressure to be believed by the authorities as he would not be allowed to remain in the program if it was determined that he had lied. J.A. 182. Sarivola had been accepted into the program in August, 1984, after organized crime members attempted to "assassinate" him. Donna was accepted a few months later. J.A. 94.

In March, 1985, the Sarivola's had to be reapproved for the program. Donna admitted that being in the Witness Protection Program was "very important for Tony [Sarivola]." Anthony Sarivola testified that the Witness Protection Program "was necessary to maintain life" for the Sarivola family. J.A. 130-131, 179-180, 182.

c. The "Confession" To Donna Sarivola Was Uncorroborated By The Physical Evidence.

Donna Sarivola testified that when Fulminante confessed, he said that he took the victim into the desert; beat and sexually assaulted her; "choked her until he thought he choked every last breath out of her"; and then shot her. J.A. 168-169. Physical evidence from wounds failed to corroborate this. The medical examiner testified that there was no evidence that the victim was beaten or sexually assaulted. J.A. 186-188; R.T. Dec. 16, 1985 at 55, 59-60. In the special verdict at sentencing, the trial court specifically stated that it could not make a finding that the victim had been sexually assaulted, because there was no corroboration from the medical examiner. J.A. 192.

The medical examiner testified that there was no evidence that the victim was choked. Although a torn towel was found around the victim's neck, the medical examiner concluded that it "doesn't have anything to do with the death." J.A. 187. Therefore, there exists doubt about whether Fulminante ever confessed to Donna.

Donna testified that the killing occurred in the desert, but gave no details as to location or how the victim was transported there. Further, Donna testified that Fulminante admitted to shooting the victim, but Donna could not recall how many times he said he shot her. J.A. 168-169. It is obvious that Donna was trying to support her husband in his testimony, but could not produce sufficient details to corroborate either confession.

2. Evidence Of Highly Prejudicial Matters Was Admitted Solely In Conjunction With The Confession To Informant Sarivola.

The admission of the confession to Sarivola is not harmless error beyond a reasonable doubt. The following items of evidence were admitted solely in conjunction with the prison setting in which the confession to Sarivola was made:

1. That Fulminante had a prior felony conviction for being a felon in possession of a firearm. J.A. 45-48, 53-54, 56-64, 67-70; R.T. of Dec. 4, 1985 at 39-40; R.T. of Dec. 10, 1985 at 82.

2. That Fulminante had a prior felony conviction for uttering false instruments. J.A. 45-48, 53-54, 56-64, 67-70; R.T. of Dec. 4, 1985 at 39-40; R.T. of Dec. 10, 1985 at 82.

3. That Fulminante had been sent to prison on two separate occasions. J.A. 45-48, 53-54, 56-64,

67-70; R.T. of Dec. 4, 1985 at 39-40; R.T. of Dec. 10, 1985 at 82.

4. That Fulminante had a reputation in prison for being untruthful. J.A. 85, 185.

5. That Ticano vouched for the fact that Sarivola had been truthful. J.A. 137.

6. That Fulminante knowingly associated with a member of an organized crime family. J.A. 45-48, 66-67; R.T. of Dec. 4, 1985 at 27-29; R.T. of Dec, 11, 1985 at 12-14.

Fulminante did not testify at trial. If the confession had been suppressed, these items would not have been admitted.

The above items have no relevance to the second confession to Donna Sarivola. That confession did not take place in a prison setting. J.A. 91-92, 110-111. If only the confession to Donna had been admitted at trial, the above items would have been inadmissible. Therefore, the confession to Anthony Sarivola was not merely "cumulative" to the second confession.

D. An Accusatorial System Of Justice Cannot Tolerate The Application Of The Harmless Error Doctrine To Coerced Confessions.

1. Over Two Hundred Years Of Anglo American Law Have Held That Coerced Confessions Are Inadmissible.

The concept of voluntariness of confessions is deeply rooted in English common law. Until the middle of the seventeenth century, confessions were admissible in English courts regardless of the method of extraction. Even torture was accepted as a method of persuasion. McCormick on Evidence note 2, at 372 (3d ed. 1984);

Developments in Law—Confessions, 79 Harv. L. Rev. 935, 954 (1966).

In *King* v. *Warickshall*, 168 Eng. Rep. 234 (K.B. 1783), the English Court held that a "confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable shape when it is to be considered as the evidence of guilt that no credit ought to be given to it; and therefore it is rejected." 168 Eng. Rep. 234, 235. This doctrine was adopted as part of federal evidence law by this Court in *Hopt* v. *Utah*, 110 U.S. 574 (1884). Later, in *Bram* v. *United States*, 168 U.S. 532 (1897), this Court held that use of a coerced confession was reversible error *per se* because it could never be said the "confession was not prejudicial." 168 U.S. 532, 541.

The decisions of this Court since *Bram* have relied upon the Due Process Clause of the Fourteenth Amendment. This constitutional tenet is so strong that a conviction, founded in part upon the evidence of an involuntary confession, must be set aside even if the evidence apart from the confession is more than sufficient to uphold a jury's verdict of guilt. C. McCormick, *Evidence*, Sections 147-150 (2d ed. 1972); 3 J. Wigmore, *Evidence*, Sections 821-826 (Chadbourn Rev. 1970); Ritz, *Twenty-Five Years of State Criminal Confession Cases in the U.S. Supreme Court*, 19 Wash. & Lee L. Rev. 35, 43-51 (1962).

It is clear that the prohibition against the admission of coerced confessions at trial has long held a special position in Anglo-American law. For over ninety years, this Court has held the prohibition in such a special position, that reversal *per se* has been required when a coerced confession has been admitted at trial.

2. A Civilized System Of Justice Must Condemn The Admission Of A Coerced Confession.

a. In *Rogers* v. *Richmond*, 365 U.S. 534 (1961), this Court stated:

> Our decisions under that Amendment [Fourteenth] have made it clear that convictions following the admission into evidence of confessions which are involuntary, i.e., the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. (Citations omitted).

365 U.S. 534, 540-541. In *Miller* v. *Fenton*, 474 U.S. 104 (1985), this Court held that certain interrogation techniques "*are so offensive to a civilized system of justice that they must be condemned.*" 474 U.S. 104, 109 (emphasis added). This Court further stated:

> The Court's analysis has consistently been animated by the view that "ours is an accusatorial and not an inquisitorial system," *Rogers* v. *Richmond* . . . . (Citations omitted).

474 U.S. 104, 109-110.

The State of Arizona asks this Court to ignore *stare decisis* by applying harmless error analysis to the admission of a coerced confession. This Court is asked to overrule twenty-four opinions decided under the Due Process Clause. The state has "the heavy burden of persuading the court the changes in society or in the law dictate that the value served by *stare decisis* yield in favor of a greater objective." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986).

The state articulates no reason why the principles stated in *Rogers* v. *Richmond*, *Miller* v. *Fenton*, and *Rose* v. *Clark* are no longer valid. Indeed, it should not

seriously be contended that our system of justice should change from an accusatorial one to an inquisitorial one. Nor should it be seriously argued that the use of brutality to obtain a confession is no longer "offensive to a civilized system of justice." Such conduct "must still be condemned." *Miller* v. *Fenton*, 474 U.S. 104, 109.

b. The state, citing *Stein* v. *New York*, 346 U.S. 156 (1953), asserts that this Court has applied the per se reversal rule to coerced confessions because of the inherent unreliability of such confessions. The state then declares that this Court has applied harmless error analysis to other constitutional errors in which the concern was the "evidentiary value" of the improper evidence. Brief of Petitioner 24-28.

Reliance on *Stein* v. *New York*, is misplaced. In *Payne* v. *Arkansas*, this Court held that a "coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment." 356 U.S. 560, 568. This Court then stated, "*Stein* v. *New York*, is not to the contrary, for in that case this Court did not find that the confession was coerced." 356 U.S. 560, 568, n. 15 (citation omitted). Since 1936, this Court has consistently stated that coerced confessions are not subject to harmless error analysis under the Due Process Clause. These decisions do not turn alone on the "inherent untrustworthiness" of such confessions.

The Solicitor General contends that *stare decisis* should not apply because the "rules adopted in *Bram* have not survived this Court's recent decisions on the issues of coerced confessions and harmless error." Brief for the United States 29. *Bram* followed the common law approach that a coerced confession was inherently untrustworthy. *Bram* did not consider fundamental fair-

ness under the Due Process Clause which has been the basis of this Court's decisions for over fifty years.

In *Spano* v. *New York*, in addition to the coerced confession, there was an admissible confession and an eyewitness who testified that the defendant had murdered the victim. Despite the overwhelming evidence of guilt, this Court held the conviction had to be reversed. This Court stated:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that *in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.* (Emphasis added.)

360 U.S. 315, 320-321. The state and the Solicitor General chose to ignore this principle.

3. A New Trial Would Not Be Unduly "Inconvenient."

The state contends that harmless error analysis should be applied to the coerced confession in this case, because it would be "inconvenient" to retry the case. Brief of Petitioner 31-32. See also, Brief for the United States 20-21. A similar argument was made in *Vasquez* v. *Hillery*, 474 U.S. 254 (1986), where this Court condemned racial discrimination in the selection of grand jurors. *Vasquez* rejected the inconvenience argument, stating that granting a new trial, "the only effective remedy for this violation—is not disproportionate to the evil that it seeks to deter." 474 U.S. 254, 262 (footnote omitted).

Vasquez went on to state that "if grand jury discrimination becomes a thing of the past, no conviction will ever again be lost on account of it." 474 U.S. 254, 262. Here, if

no prosecutor chooses to introduce a coerced confession at trial, "no conviction will ever again be lost on account of it." Granting a new trial in this case is not disproportionate to the evil being corrected.

Any inconvenience in this case would be slight. In the first trial, opening statements commenced on December 4, 1985. J.A. 65. The verdict was returned on December 19, 1985. R.T. of Dec. 19, 1985 at 3; Brief of Petitioner 7. A retrial should take considerably less time because there would be no need for the testimony of Sarivola and Agent Ticano.

A week long trial seems a slight inconvenience in a capital case. It is particularly unfair to consider any inconvenience to the prosecutor when he, knowing the confession had been coerced, produced it at trial. The prosecutor had interviewed Sarivola at length on at least three occasions prior to trial. He had also met with Ticano. J.A. 88-93. The prosecutor knew the totality of the circumstances when he moved to admit the confession. He should not now be heard to complain of "inconvenience" caused by his own conduct.

4. Comparison With Other Constitutional Violations Which This Court Has Held Are *Not* Subject To Harmless Error Analysis.

The Brief for the United States concedes the following constitutional errors are *not* subject to harmless error analysis:

1. Trial before a judge with a financial interest in the outcome. *Rose* v. *Clark*, 478 U.S. 570, 577-579. See also *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681-682 (1986); Brief of Petitioner 28.
2. Complete denial of counsel at trial. *Rose* v. *Clark*, 478 U.S. 570, 577-579. See also *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681-682.

3. Appointment of a prosecutor with a financial interest in the outcome of a case. *Young* v. *Vuitton et Fils S.A.*, 481 U.S. 787, 809-814 (1987) (plurality opinion).

4. Directing a verdict for the prosecution in a criminal trial by jury. *Rose* v. *Clark*, 478 U.S. 570, 578.

5. Unlawful exclusion of members of the defendant's race from the grand jury. *Vasquez* v. *Hillery*, 474 U.S. 254.

6. Erroneous denial of a defendant's right to represent himself at trial. *McKaskle* v. *Wiggins*, 465 U.S. 168, 177 n. 8 (1984).

7. Failure to instruct a jury on the reasonable doubt standard. *Jackson* v. *Virginia*, 443 U.S. 307, 320 n. 14 (1979).

8. Improper compulsory joint representation of defendants with conflicting interests. *Holloway* v. *Arkansas*, 435 U.S. 475, 491 (1978).

9. Denial of a public trial. *Waller* v. *Georgia*, 467 U.S. 39, 49 and n. 9 (1984).

Brief for the United States 21-22. None of the above situations are more serious than admission at trial of a coerced confession.

5. Comparison With Other Constitutional Errors Which This Court Has Held Are Subject To Harmless Error Analysis.

a. Fourth Amendment Violations.

The Solicitor General contends that use of a coerced confession is no more "reprehensible" than violations of the Fourth Amendment which this Court has held are subject to harmless error analysis. Brief of the United States 28. Fourth Amendment violations are not of the

same magnitude. This is illustrated by the fact that coerced confessions are one of the "classic grounds" for writs of habeas corpus. *Teague* v. *Lane*, 489 U.S. 288 (1989). Fourth Amendment violations are not favored in habeas corpus matters. See *Stone* v. *Powell*, 428 U.S. 465 (1976).

b. Fifth Amendment Violations.

The Solicitor General states that because *Miranda* violations are subject to harmless error analysis, it is equally appropriate to apply that doctrine to coerced confessions. Brief of the United States 25-26. This contention ignores the fact that coerced confessions are inadmissible under the Due Process Clause. *Miranda* violations are not even of constitutional dimension. *Oregon* v. *Elstad*, 470 U.S. 298 (1985).

c. Sixth Amendment Violations.

The Solicitor General states that this Court has held Sixth Amendment violations to be subject to harmless error analysis, citing *Satterwhite* v. *Texas*, 486 U.S. 249 (1988) (denial of counsel during a psychiatric examination). Brief of the United States 26-27. This Court in *Satterwhite*, specifically stated that Sixth Amendment violations that pervade the entire proceeding are not subject to harmless error analysis. This Court cites *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) (conflict of interest in representation); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (right to counsel); *White* v. *Maryland*, 373 U.S. 59 (1963) (absence of counsel from arraignment causing defenses not asserted to be lost). Similarly, a coerced confession corrupts the entire proceeding.

d. The Primacy Of Admission Of A Coerced Confession As Fundamental Error.

The importance of precluding a coerced confession at trial is well illustrated in *Rose* v. *Lundy*, 455 U.S. 509 (1982). In dissent, Justice Stevens states, "In my opinion claims of constitutional error are not fungible. There are at least four types." 455 U.S. 509, 542-543. Use of coerced confessions at trial and a proceeding pervaded by mob violence are in the highest echelon of constitutional error. 455 U.S. 509, 543-544.

The Solicitor General contends Fourth Amendment violations are no more "reprehensible" than admission of a coerced confession. Brief of the United States 28. Justice Stevens disagreed as he placed the Fourth Amendment violation in *Stone* v. *Powell* in only the third category of constitutional error.

The Solicitor General argues that *Miranda* violations are comparable to coerced confessions. Brief for the United States 26. As *Miranda* violations are not of constitutional dimension, it would appear they belong in the lowest category of error. The Fifth Amendment violation in *Chapman* v. *California*, 386 U.S. 18 (1967), cited by the Solicitor General, was placed only in the second rung of error by Justice Stevens.

The Solicitor General also compares the use of coerced confessions to the Sixth Amendment violation in *Harrington* v. *California*, 395 U.S. 250 (1969). Brief for the United States 25. Justice Stevens specifically cites this case and places it in only the second rung of constitutional error.

CONCLUSION

The judgment of the Supreme Court of Arizona should be affirmed.

Respectfully submitted,

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